No. 94-226

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1994**

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THE FLORIDA BAR,

*Petitioner*,

vs.

G. STEWART McHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,

*Respondents*.

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**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

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## AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF THE PETITIONER AND SUGGESTING REVERSAL

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C. Rufus Pennington, III
(Counsel of Record)
Margol & Pennington, P.A.
76 South Laura Street Suite 1702
Jacksonville, Florida 32202
(904) 355-7508

*Counsel for Amicus Curiae*
*The Academy of Florida Trial Lawyers*
F. Gregory Barnhart, President
The Academy of Florida Trial Lawyers

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# BRIEF AMICUS CURIAE OF THE ACADEMY OF FLORIDA TRIAL LAWYERS IN SUPPORT OF PETITIONER AND SUGGESTING REVERSAL

## IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Academy of Florida Trial Lawyers ("the Academy") respectfully files this *amicus curiae* brief pursuant to Rule 37.3 of the Rules of this Court.[1]

[1] The letters of the parties expressing their consent have been filed with the Clerk of the Court.

The Academy is a voluntary association of approximately four thousand Florida attorneys specializing in trial practice. The Academy was founded by the leading trial lawyers of the State of Florida, and continues to include among its membership those lawyers recognized as the preeminent trial attorneys in our state. The great majority of our members are engaged in the representation of plaintiffs in civil actions for personal injury and wrongful death.[2] The Academy is, for all practical purposes, the organized plaintiff's trial bar of the State of Florida. As such, we represent lawyers who may be more directly affected by issues of constitutional protection for attorney solicitation and advertising than the petitioner or Florida lawyers generally.[3]

As a result of the disastrous consequences of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its progeny, we wholeheartedly endorse The Florida Bar's attempts to regulate attorney advertising and solicitation; and we urge the Court to accept the Bar's invitation to reconsider the wisdom of *Bates*.

## SUMMARY OF ARGUMENT

Turn on a television on any afternoon in any city or town in the nation, or open the yellow pages of any telephone book anywhere in the country, and one will see what the *Bates* decision has done to our judicial system. We urge the

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[2] The Academy's goals as stated in its Charter are, *inter alia*, to promote public safety and welfare while protecting individual liberties; to assure that the courts of the State of Florida remain accessible to every person for the redress of any injury and that the right to trial by jury remains inviolate; and to uphold the honor and dignity of the profession of law. Article II, Sections 1(g), (h), (e), Charter of the Academy of Florida Trial Lawyers.

[3] Petitioner The Florida Bar is an official arm of the Supreme Court of Florida, and is composed of all lawyers admitted to practice in Florida.



Court to reexamine the issue of First Amendment protection for attorney advertising and solicitation, and to adopt a more appropriate constitutional analysis. Respectfully, that constitutional analysis should recognize that attorneys serve as an integral part of the judicial branch of government; that advertising and solicitation activities by lawyers uniquely affect the institution of the judiciary; and that, to preserve and protect public confidence in the administration of justice, it is essential that the States be permitted to regulate lawyer advertising.

## ARGUMENT

The Florida experience with attorney advertising presents a case study of how *Bates*, "an early experiment with the doctrine of commercial speech," *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 487 (O'Connor, J., dissenting), has gone terribly awry. *Bates* was initially received by the Florida judiciary and bar, if not with enthusiasm, then at least with a measure of optimism. In 1977, the Supreme Court of Florida expressed its hopes about competition fostered by attorney advertising:

> Although the full implications of the recent decision of the United States Supreme Court in *Bates* have yet to manifest themselves, the approval of lawyer advertising therein should result in a greater awareness in the public concerning attorneys' services and fees. Thus the 'open marketplace' competition promoted by such broader dissemination of information, in and of itself, should tend to be a self-regulating factor in the establishment of fees.

*In re Amendment to Code of Professional Responsibility (Contingent Fees)*, 349 So.2d 630, 632 (Fla. 1977) (citation omitted). The decision in *Bates* was grounded in part on the

expectation that open competition for clients, stimulated by lawyer advertising, would result in greater access to the legal system. *Bates*, 433 U.S. at 277 ("where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising.")

In dissent, Justice Powell warned that,

> [T]oday's holding will be viewed by tens of thousands of lawyers as an invitation -- by the public-spirited and the selfish lawyers alike -- to engage in competitive advertising on an escalating basis.

*Bates v. State Bar of Arizona*, 433 U.S. 350, 377 (Powell, J., dissenting in part). The *Bates* majority allayed these concerns by predicting that:

> [M]ost lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of the profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward.

*Bates*, 433 U.S. at 379.

It soon became apparent, however, that this premise of *Bates* was indeed naive. When lawyer advertising became constitutionally protected "commercial speech," the trained advocates of our most competitive profession were invited to stoop to the values of the marketplace. Many accepted the invitation. As lawyer advertising rapidly degenerated into today's exploitative carnival, the public's level of confidence in the bar plummeted. Moreover, the profession of the law is integrally associated with (and, at least under Florida law, is



an official part of) the judicial branch of government. Put more bluntly, from the public's point-of-view, judges are lawyers with robes. The unfortunate long term result of attorney advertising, as borne out by the record in this case, was that the public's perception of the integrity of the judicial branch of government was marred.

As lawyer advertising was eating away at the public's confidence in the judiciary, it was failing to affect fees through increased competition. *See The Florida Bar re Amendment to the Code of Professional Responsibility*, 494 So.2d 960, 961 (Fla. 1986). Specifically with respect to contingent fees in personal injury matters, lawyer advertising did not have the effect anticipated by the *Bates* majority. By 1986, although there was "no hard evidence that the contingent fee system [was] being abused," the Florida Supreme Court felt it necessary to regulate contingent fees due exclusively to the public *perception* of abuse. *Id.* Not only had advertising failed to reduce the level of contingent fees, it undoubtedly was the major cause of this public perception that the judicial system was a vehicle of abuse by advertising lawyers.

While attorney advertising in Florida produced little if any demonstrable good and a great deal of palpable bad, it was still thought that the state supreme court had the authority to prohibit outright solicitation of potential clients. As recently as 1981, the Supreme Court of Florida held that targeted direct mail solicitation was subject to disciplinary action and was not protected by the First Amendment. *The Florida Bar v. Schreiber*, 407 So.2d 595 (Fla. 1981). Expressing concerns that solicitation by mail would be nearly as pernicious as in-person solicitation, the court stated:

> We do not perceive that a citizen receiving a letter written on stationery carrying an attorney's letterhead would be bold enough to discard it after only a casual perusal. Read it

> he must, for letters from attorneys carry a special aura of respect because of the state's power that attorneys can invoke, and the attorney's words carry a corresponding sense of authority.

*The Florida Bar v. Schreiber*, 407 So.2d 595, 598 (Fla. 1981).

However, even before *Schreiber* was overruled by *Shapero*, this Court's decisions in *In re R.M.J.*, 455 U.S. 191 (1982), and *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), called into question the State's authority to prohibit solicitation through the mails. In the wake of those decisions, the supreme court felt constrained to modify Florida's disciplinary rules to regulate, rather than to proscribe, direct mail solicitation. Accordingly, in 1986, the Supreme Court of Florida adopted a rule specifically authorizing the direct solicitation of prospective personal injury clients by mail. *The Florida Bar re Rules Regulating the Florida Bar*, 494 So.2d 977, 978 (Fla. 1986). Almost immediately upon adoption of the rule, reports of alleged abuses of direct mail solicitation began to occur. Within the year, the public outcry had reached a level that the president of The Florida Bar appointed a Special Committee on Solicitation to investigate the rapidly accumulating number of alleged abuses. As reported by the committee:

> Within six months after the rule became effective, newspapers throughout the state began to report that accident victims, bereaved spouses and parents, and other victims of misfortune were being inundated with the mailed importunings of Florida lawyers. Newspapers also reported that police departments were being burdened by lawyers' demands for copies of accident reports and that some lawyers were engaged in illegal and unethical solicitation in-person, by telephone and through agents.



Final Report of the Special Committee on Solicitation of The Florida Bar (1987) (see the appendix to this brief).[4]

In response to this report, The Florida Bar began an in-depth two year study of the impact of attorney advertising and solicitation.[5] Before the study was completed, however, the Court decided *Shapero v. Kentucky Bar Association*, firmly establishing an attorney's First Amendment right to engage in targeted direct mail solicitation of potential clients as a matter of federal constitutional law. The Florida court was therefore severely limited in its ability to deal with the widespread complaints related to lawyer solicitation through the mails.

By the late 1980's, the ultimate effects of *Bates* and its progeny had become clear to all. The plaintiff's trial bar in Florida had reached a consensus that, except for the financial rewards reaped by a small group of practitioners, the extension of constitutional protection to attorney advertising and solicitation had proved a complete failure. There was no meaningful benefit to the citizens of our State. The only competition fostered by *Bates* appeared to be a contest to determine the most "effective" television commercials. One could predict, with morbid certainty, that a volley of

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[4] Although the committee's report is not a matter of record in this case, it is closely analogous to factual data relied upon and cited by the Court in other cases. *See, e.g., Regents v. Bakke*, 438 U.S. 265 (1978); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 56-57 n.111 (1973).

[5] The results of this study are in the record.

lugubrious letters from lawyers would await the victim of any tragedy involving injury or death.

Even if potential clients were viewed as mere "consumers" of legal services, the bombardment of grotesque television commercials, the mind-numbing array of page after page of yellow page advertisements and the intrusive "personalized" letters sent to grieving accident victims could only serve to confuse those in need of representation. Worse, the commercial peddling of litigation that *Bates* and its progeny allowed, indeed affirmatively encouraged, had clearly left the public disgusted with the judicial system.

In 1994, the dissents in *Bates* have proved prescient indeed. Respectfully, today it would take an even greater naiveté than displayed by the *Bates* majority for this Court to conclude that lawyer advertising and solicitation have not tainted the judicial system, along with the lawyers who serve that branch of government. As a more recent dissenter has written,

> In one way or another, time will uncover the folly of this approach. I can only hope that the Court will recognize the danger before it is too late to effect a worthwhile cure.

*Shapero v. Kentucky Bar Association*, 486 U.S. 466, 491 (O'Connor, J., dissenting).

We endorse The Florida Bar's suggestion that an "institutional speech" analysis would provide a far more appropriate framework in this context than does a "commercial speech" analysis. However, whatever analysis might be deemed most suitable, the important point is that the States should be left with a reasonable measure of authority to regulate attorney advertising and solicitation.



## CONCLUSION

The Academy of Florida Trial Lawyers, *amicus curiae*, respectfully urges the Court to reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

C. Rufus Pennington, III
(Counsel of Record)
Margol & Pennington, P.A.
76 South Laura Street Suite 1702
Jacksonville, Florida 32202
(904) 355-7508

*Counsel for Amicus Curiae*
*The Academy of Florida Trial Lawyers*

F. Gregory Barnhart, President
*The Academy of Florida Trial Lawyers*

# APPENDIX

## SPECIAL COMMITTEE ON SOLICITATION
## FINAL REPORT

Summary of recommendations: Targeted direct mail solicitation should be abolished; new restrictions should be imposed on general direct mail advertising; forfeiture of fees should be added to the Bar's disciplinary arsenal for cases establishing improper solicitation; and The Florida Bar should file an amicus brief in *Shapero v. Kentucky Bar Association*, which is pending before the United States Supreme Court and which challenges an absolute ban on targeted direct mail solicitation.

### Background

The Special Committee on Solicitation was created in July and charged with the task of investigating reported improper or abusive solicitation by some members of The Florida Bar and with recommending measures to curb such misconduct. Specifically, the Committee was charged with determining:

1) Whether the Rules of Professional Conduct regulating solicitation conform to the mandate of the caselaw;

2) What time, place and manner restrictions are authorized or permitted by decisions of the United States Supreme Court;

3) What types of abuses, if any, have emerged in Florida;

4) What other states have done to regulate solicitation by lawyers; and

5) What amendments, if any, to the Rules and commentary are necessary and appropriate to conform the Rules to the mandate of the United States Supreme Court; to curb identified abuses; or to ensure that the public is protected



from coercion, overreaching, deception or invasions of privacy on the part of soliciting lawyers.

In performance of this task the Committee has reviewed the caselaw, other states' regulatory efforts, newspaper accounts of improper solicitation and written comments and complaints submitted by members of the Bar and the public. In addition, the Committee conducted public hearings in four cities in October to receive comments from members of the Bar and the public. On October 5, the day before the first of these public hearings, the United States Supreme Court granted certiorari in *Shapero v. Kentucky Bar Association*.

In its 1986 order adopting the Rules Regulating The Florida Bar, the Florida Supreme Court lifted the absolute ban on direct mail solicitation effective January 1, 1987. The court concluded that the ban was inconsistent with recent pronouncements of the United States Supreme Court. The Florida court stated, however, that if regulation of targeted direct mail solicitation, as provided for in Rule of Professional Conduct 4-7.3 (to be renumbered 4-7.4 effective Jan. 1, 1988), proved unworkable or a pattern of abuse was established, the court would consider amending the rule. 494 So.2d 977, 978.

Within six months after the rule became effective, newspapers throughout the state began to report that accident victims, bereaved spouses and parents, and other victims of misfortune were being inundated with the mailed importunings of Florida lawyers. Newspapers also reported that police departments were being burdened by lawyers' demands for copies of accident reports and that some lawyers were engaged in illegal and unethical solicitation in-person, by telephone and through agents.

As one of the first acts of his term, Bar President Ray Ferrero appointed this Committee to ascertain whether Florida

lawyers were in fact abusing Rule 4-7.3 and what measure could be taken to halt any such abuses. The Committee filed an interim report with the Board of Governors at the September Board meeting. The report tentatively identified several amendments to Rule 4-7.3 that would be necessary to curb abuses and protect the public. The report further identified other measures under consideration. After further factfinding, this Committee has concluded that abuses by lawyers and harm to the public is inherent in direct mail solicitation and that, accordingly, the practice should be banned absolutely.

**Findings**

1) Most lawyers and nonlawyers oppose direct mail solicitation. This finding is supported by views expressed to Ray Ferrero during his speaking engagements before nonlawyer groups around the state, by informal polls of voluntary bar associations and sections of The Florida Bar, by letters to the editors of Florida newspapers, by newspaper editorials and by complaints received by The Florida Bar from lawyers and recipients of solicitation letters.

2) Direct mail solicitation has generated considerable negative publicity and condemnatory editorials for the legal profession and has caused public respect for and confidence in the profession and the court system to plummet. More than one Florida personal injury lawyer has encountered hostility or cynicism on the part of prospective jurors during voir dire, which suggests that innocent plaintiffs with meritorious claims may be injured by direct mail solicitation.

3) Direct mail solicitation infringes on recipients' right to privacy as guaranteed by the Florida



Constitution. This infringement is particularly egregious because it often occurs during periods of emotional stress.

4) Direct mail solicitation cannot be effectively regulated because lawyers have no means of complying with the mandate of Rule 4-7.3 that solicitations not be mailed to anyone whose physical, mental or emotional state is such that they cannot make a reasoned decision whether to hire a lawyer. Similarly, in most instances lawyers have no means of determining whether an intended recipient has already retained counsel in the matter.

5) Complaints from recipients of lawyers' direct mail solicitations demonstrate that such solicitation often causes the recipient emotional distress at a time when the recipient is, by virtue of the misfortune prompting the solicitation, particularly vulnerable.

6) The use of public records to identify individuals with a specific legal problem has burdened law enforcement agencies and has caused distress and unease among targets who did not realize that their identity and their legal problem were open to scrutiny and opportunistic use by strangers.

**The Case Law**

As a general rule, lawyer advertising that is not false or deceptive and does not concern unlawful activities can be restricted only in the service of a substantial governmental interest and only through the least restrictive means. In 1982 the United States Supreme Court struck down a state's absolute ban on direct mail advertising by lawyers because ***there was no showing that less restrictive regulation would be insufficient*** to serve legitimate interests of the state. *In re*

*R.M.J.*, 455 U.S. 191. The Court has yet to rule on targeted direct mail solicitation. However, the Court has upheld a prophylactic ban on in-person solicitation in circumstances in which fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct are likely to occur. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462. *Ohralik* involved in-person solicitation of accident victims. The Court recognized that in the absence of an absolute ban, in-person solicitation would be virtually immune to effective oversight and regulation.

Some authorities have interpreted *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 105 S.Ct. 2265 (1985), as signaling that an absolute ban on direct mail solicitation of prospective clients known to have specific legal problems will fall. *Zauderer* involved a newspaper advertisement that solicited and gave legal advice to prospective clients who had a particular cause of action. The Court in *Zauderer* distinguished print advertising from in-person solicitation as usually posing much less risk of overreaching or undue influence and as not involving an invasion of privacy. The Court rejected Ohio's arguments for its prophylactic ban on advertisements that solicit and give legal advice because *there was no record to support the ban as necessary* to achieve legitimate interests of the state.

This Committee does not believe that *Zauderer* precludes an absolute ban on targeted direct mail solicitation where a state can demonstrate that less restrictive regulation was tried but failed to effectuate the legitimate interests of the state. In this regard, two observations made by the Court in *Ohralik* with respect to in-person solicitation are applicable to targeted direct mail solicitation: First, the Court noted that the very plight of an unsophisticated, injured or distressed lay person "not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may



distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even when no other harm materializes." 436 U.S. at 465-466. Second, the Court recognized that "A lawyer who engages in personal solicitation of clients may be inclined to subordinate the best interests of the client to his own pecuniary interests. Even if unintentionally, the lawyer's ability to evaluate the legal merit of his client's claims may falter when the conclusion will affect the lawyer's income. A valid claim might be settled too quickly, or a claim with little merit pursued beyond the point of reason. These lapses of judgment can occur in any legal representation, but we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest." 436 U.S. at 461, n. 19.

This Committee is aware that the Supreme Court has held that the government cannot suppress potentially offensive speech if the captive audience has a means of avoiding such speech, and that recipients can avoid objectionable mail by discarding it unopened. *Bolger v. Youngs Drug Products Corp.*, 103 S.Ct. 2875 (1983). However, the Committee believes that this reasoning is invalid with respect to direct mail solicitation by lawyers. The basis for the Committee's position is that most lawyer solicitations are prompted by some misfortune involving the target, and the public is aware that such solicitations are motivated primarily by the lawyers' interest in the anticipated fees, with the result that the mere presence of a lawyer's solicitation letter in the target's mail box at a time of emotional stress is offensive to the target.

As noted previously, the Court has granted certiorari in *Shapero v. Kentucky Bar Association*, a case that tests the constitutional validity of a prophylactic ban on direct mail solicitation of clients known to have a specific legal problem or cause of action. It is widely expected that Kentucky's rule will fall because there is no record to support its necessity.

This Committee, on the other hand, has compiled a record that demonstrates that many of the same evils inherent in in-person solicitation are inherent in direct mail solicitation. Thus the Committee recommends that The Florida Bar file an amicus brief in *Shapero* in an effort to persuade the United States Supreme Court to limit the reach and effect of its opinion should that opinion be adverse to Kentucky.

**Recommendations**

1) That the Florida Supreme Court revoke those provisions of Rule 4-7.3 that authorize targeted direct mail solicitation.

2) That general direct mail advertising continue to be permitted, as it was before January 1 under DR 2-104(B) of the Code of Professional Responsibility.

3) That the following requirements (drawn from the Committee's interim report) be adopted for general direct mail advertising:

a) The "advertisement" mark on the envelope and on the communication itself must appear in red and be at least one-fourth inch in size.

b) Direct mail communications may be sent only by regular mail, and not by registered mail, courier or other forms of restricted delivery.

c) The first sentence of the communication must state in capital letters, "If you have already retained a lawyer for this matter, please disregard this letter."

d) Lawyers may not state in direct mail communications that the communications have been approved by the Florida Bar or are permitted by the Florida Bar.



e) Lawyers mailing direct mail communications concerning personal injury law must enclose with their communications a copy of the statement of client's rights set out in rule 4-1.5, but with the signature line deleted. An explanation of the enclosure must be included in the advertisement. these documents are to be of the same type size as the advertisement letter.

f) No contract for representation may be mailed with the advertisement letter.

g) The advertisement must include a statement advising the client who will actually handle the case and/or trial of the matter. The advertisement also must include the statement required by new rule 4-7.3 concerning the availability of a writing setting forth the qualifications and experience of the lawyer or law firm.

4) That the Board of Governors authorize a professional survey of the public to provide additional evidence of the impact of direct mail solicitation on public confidence in the legal profession and the court system and the impact on the administration of justice.

5) That The Florida Bar file an amicus brief in *Shapero v. Kentucky Bar Association.*

6) That the Board of Governors reaffirm that in-person solicitation by lawyers and their agents is both illegal and unethical, and reaffirm The Florida Bar's commitment to seeking both professional discipline and criminal prosecution of lawyers who engage in such practices.

7) That The Florida Bar seek amendment of the Rules of Discipline to authorize forfeiture of fees as an available disciplinary measure when improper solicitation by a lawyer or his agent is established. The amendment should provide that fees forfeited for improper solicitation should be paid over to the Client's Security Fund.